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Supreme Court, U.S.
FILED

No. 081283 APR 16 2009

OFFICE OF THE CLERK

In the Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves important and recurring issues concerning application of the First Amendment to politically controversial messages that owners of motor vehicles wish to communicate on specialty license plates affixed to their vehicles. Those questions are:

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that a state's selective refusal to approve a "Choose Life" specialty plate – after approving scores of other specialty plates, some involving controversial subjects – is content rather than viewpoint discrimination and does not violate the First Amendment rights of individuals who would like to express their views in support of adoption and against abortion by displaying the plates on their vehicles.

2. Whether the Seventh Circuit correctly held, in conflict with the Eighth Circuit and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), that a specialty license plate program that grants standardless authority to approve or reject new messages on plates is not facially invalid under the First Amendment if it vests that licensing authority in a legislative body

RULE 14.1(b) AND 29.6 STATEMENT

In addition to Choose Life Illinois, Inc., petitioners here (plaintiffs below) include the following 15 individuals, all of whom reside in Illinois: Richard Bergquist, Sue Bergquist, James Finnegan, Phyllis Finnegan, Daniel Gura, Sandra Gura, Becky MacDougall, Virginia McCaskey, Thomas Morrison, Bethany Morrison, Dan Proft, Richard Stanek, Jill Stanek, Joseph Walsh, and Carol Walsh.

Choose Life Illinois, Inc., is a non-profit corporation organized under the laws of the State of Illinois. It has no parent corporation and does not issue stock to the public.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 547 F.3d 853. The district court's opinion granting summary judgment (App., *infra*, 34a-55a) is unreported.

JURISDICTION

The court of appeals entered judgment on November 7, 2008, and denied rehearing and rehearing en banc on December 17, 2008. App., *infra*, 1a, 56a-57a. On March 4, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 16. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." Relevant provisions of the Illinois Vehicle Code, 625 ILCS 5/3-101 *et seq.*, are set forth at App., *infra*, 58a-61a.

STATEMENT

Although automobile license plates "are still used for their original purpose of tracking individuals," they have "over the years * * * become a way for Americans, who spend an average of 56 minutes a day in their cars, to express their identity." Marsh, *License To Shill*, LEGAL AFFAIRS, Jan./Feb. 2003, *50, *52. This case involves Illinois's selective refusal to approve petitioners' application for a specialty license plate bearing the words "Choose Life." The district court

held that the state's rejection of the plate, in light of its having approved "approximately 60 designs" bearing "a medley of various special-interest messages" (App., *infra*, 35a), was impermissible viewpoint discrimination The Seventh Circuit reversed. Placing itself in conflict with the Eighth and Ninth Circuits – and with decisions of this Court – the court of appeals held that (a) Illinois's actions did not violate the First Amendment as applied to petitioners' application; and (b) the Illinois specialty plate program is not facially invalid even though it delegates unfettered discretion to the General Assembly to approve or squelch private expression Further review is needed to resolve the deep divisions in the lower courts over how the First Amendment applies to specialty license plates.

A. The Illinois Specialty Plate Scheme

Almost every motor vehicle registered in Illinois must bear a license plate issued by the Secretary of State's Vehicle Services Department. App., *infra*, 35a. When vehicle owners request license plates from the Department, they may select a standard plate or a more expensive "vanity," "personalized," or "specialty" plate. *Id.* at 4a-5a, 35a.[1] Illinois offers a broad selection of specialty plates, including plates denoting that the vehicle owner "is an alumnus of a certain college or university," is "a member of a civic organization," pursues a hobby such as hunting, or supports a particular social cause. *Id.* at 4a, 35a-36a; see *id.* at 52a-55a (listing specialty plates available as of January 2007). Examples in this last category include plates declaring "I am Pet Friendly," "Be An Organ Donor," or

[1] Vanity and personalized plates use an existing plate design, but allow applicants to choose the combination of identifying letters and numbers that will appear on the plate 625 ILCS 5/3-405.1.

"Support Our Troops," (Pet. C.A. Supp. Br 1), and plates expressing opposition to violence or support for the environment. The proceeds from specialty plates typically benefit various non-profit groups that sponsor them, and to a lesser extent help defray the state's administrative processing costs App., *infra*, 5a, 35a-36a.

Illinois law vests in the Secretary of State broad authority to administer and enforce the Illinois Vehicle Code, including the provisions relating to specialty license plates. See 625 ILCS 5/2-101, 5/2-104. Section 5/3-600 of the Vehicle Code imposes several requirements on specialty plates issued since 1990 See 625 ILCS 5/3-600(c) First, it provides that the Secretary "shall not issue a series of special plates unless applications * * * have been received for 10,000 plates of that series," but authorizes the Secretary to reduce that number if the lower number "is sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate." 625 ILCS 5/3-600(a) [2] Second, as amended effective January 1, 2008, Section 5/3-600 provides that "[t]he Secretary of State shall issue only special plates that have been

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[2] Secretary of State Jesse White (respondent here) has issued a "Fact Sheet" stating his policy of reducing the minimum number of plate applications to approximately 800-850. App , *infra*, 62a-63a (reproducing "Fact Sheet"), *id.* at 5a-6a, 37a-38a The Fact Sheet also requires that, before any "new plate category" will be approved by the Secretary, "[l]egislation must be [1] introduced (by a legislator either in the Senate or the House), [2] passed by both chambers, and [3] signed into law by the Governor." *Id.* at 62a; see also *id.* at 5a-6a. These three requirements, the Fact Sheet explains, were necessary to avoid "arbitrarily * * * issuing a new plate category." *Id.* at 62a. In 2007, while this case was on appeal to the Seventh Circuit, Illinois codified the second of these requirements *in a modified form – i e*, "*authoriz[ation]*" (*whether in* the form of legislation or otherwise) by the General Assembly of new specialty plates. *Id.* at 8a.

authorized by the General Assembly." 625 ILCS 5/3-600(a).[3]

B. Petitioners' Unsuccessful Efforts To Win Approval For The "Choose Life" Plate

Petitioner Choose Life Illinois, Inc. ("CLI"), is an Illinois not-for-profit corporation dedicated to promoting the adoption of children and increasing public awareness and education about the importance of adoption. The 15 individual petitioners are Illinois residents who hold leadership positions in, or are members or supporters of, CLI. To further its goals, CLI sought approval in Illinois of a "Choose Life" specialty plate that would support adoption causes. CLI collected more than 25,000 signatures of Illinois citizens who wished to purchase the plates. Between 2001 and 2004, a period in which Illinois authorized specialty plates for various social causes, CLI and several individual petitioners tried repeatedly to persuade the General Assembly to approve the "Choose Life" plate App., *infra*, 1a-2a, 6a, 34a-35a. In an unrebutted declaration submitted in the district court, petitioner Dan Proft detailed these efforts and the hostility with which they were met *Id.* at 64a-67a (reproducing declaration).

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[3] Other provisions of the Vehicle Code regulate the content of specialty and other license plates With certain exceptions, Illinois license plates must indicate the vehicle's registration number, the year for which the registration is issued, and the state's official motto ("Land of Lincoln") and name. 625 ILCS 5/3-412(b). The Secretary may not issue any vanity plates that substantially interfere with law enforcement, are "misleading," or would "create[] a connotation that is offensive to good taste and decency " 625 ILCS 5/3-405.2; see App , *infra*, 60a-61a

C. The Proceedings In The District Court

1. Petitioners filed this lawsuit seeking declaratory and injunctive relief in the Northern District of Illinois. They alleged that Secretary White's refusal to issue the plate was "viewpoint discrimination" in violation of the First Amendment. In the alternative, they advanced a facial challenge contending that the specialty plate scheme impermissibly invited viewpoint discrimination by failing to impose *any* substantive standards on the state's decision to allow a new plate.

Respondent moved to dismiss, arguing among other things that messages on specialty license plates are government rather than private speech and that Illinois was justified in rejecting the "Choose Life" plate because of disagreement with its message. Defs.' Mem of Law in Support of Mot. To Dismiss, at 12 (Sept. 22, 2004) ("the state has an interest in selecting *only* those messages on special plates *it chooses to associate with*, and avoiding messages *it does not endorse*") (emphases added). The motion to dismiss was denied.

2. On cross-motions for summary judgment, the district court held that the state's refusal to issue the "Choose Life" plate violated the First Amendment. App., *infra*, 34a-55a. The court first examined whether the "Choose Life" message constituted private speech, government speech, or hybrid speech. App., *infra*, 40a-48a. Based on its review of the Illinois program, this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and other decisions involving specialty plates, the district court ruled that "the privately-crafted and privately-funded message on specialty license plates constitutes private speech." *Id.* at 42a-48a.

Next, the district court ruled that the state's rejection of the "Choose Life" plate was based on viewpoint

discrimination. App., *infra*, 49a-51a.[4] "[T]he 'Choose Life' message," the court reasoned, "certainly represents a viewpoint – the pro-life viewpoint" – and the state's "reason for denying the speech is because that viewpoint is controversial." *Id* at 50a. Accepting the explanation offered by the state in its motion to dismiss, the district court observed that "it appears that the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it *does not agree or wish to associate*." *Ibid.* (emphasis added). Moreover, the court reasoned, there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for denying 'Choose Life' on a specialty license plate." *Ibid*.[5] Accordingly, the court ordered respondent to issue the "Choose Life" plate, but stayed its order pending appeal.

D. The Court Of Appeals' Decision

The Seventh Circuit reversed. App., *infra*, 1a-33a. Like the district court, the appellate court first

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[4] In the summary judgment proceedings, the state failed to identify a *single other instance* of the General Assembly's rejecting a specialty license plate on substantive grounds.

[5] The district court's determination that Illinois law and the Secretary's "Fact Sheet" contained "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly and the Governor" (App., *infra*, 37a) was based on the undisputed facts. Respondent admitted that no such standards existed and agreed that his agency was "*aware of no standards that the General Assembly itself has developed or follows* in making the approval decision" for new specialty plates. See Defs.' Response To Plfs.' Statement of Undisputed Facts, at 10 (Dec. 7, 2005) (emphasis added). Ultimately, the district court concluded that there was no need to decide petitioners' facial challenge (or, on the as-applied claim, the nature of the forum). App., *infra*, 37a n.2, 50a-51a.

reviewed the extensive (and conflicting) circuit decisions on the nature of speech on specialty license plates and concluded that the "Choose Life" message was "not government speech." *Id.* at 11a-22a. The Seventh Circuit disagreed, however, with the district court's determination that Illinois had engaged in viewpoint discrimination. Accepting at face value respondent's new assertion on appeal that there was an unwritten, undocumented, and previously unarticulated policy of excluding "the entire subject of abortion" from Illinois's "specialty-plate program" (compare note 5, *supra*), the court of appeals held that Illinois had engaged only in content-based discrimination. App., *infra*, 25a. The Seventh Circuit acknowledged that the Ninth Circuit, in *Arizona Life Coalition, Inc.* v. *Stanton*, 515 F.3d 956 (9th Cir.), cert denied, 129 S. Ct 56 (2008), a case "very much like our own," had reached "the opposite conclusion." App., *infra*, 19a-20a, 25a-26a.

Because content-based discrimination is subject to strict scrutiny in traditional and designated public fora but only to reasonableness review in nonpublic fora, the Seventh Circuit proceeded to examine the nature of the forum created by the Illinois program. App., *infra*, 22a-24a. "Specialty license plates," the court reasoned, "are an unusual species of forum – certainly not a traditional public forum, and we think not a designated public forum, either." *Id.* at 23a. Instead, it concluded, they qualify as a nonpublic forum because *license plates in general* are heavily regulated, have a "primary purpose" of "identify[ing] the vehicle," and "are not by nature compatible with anything more than an extremely limited amount of expressive activity." *Id.* at

23a-24a.[6] The court also held that Illinois's exclusion of any specialty-plate messages touching on "the entire subject of abortion" was reasonable. *Id.* at 25a, 27a-28a.

Finally, the Seventh Circuit rejected petitioners' facial challenge. App., *infra*, 10a n.4. The court said the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid:

> It is axiomatic that one legislature cannot bind a future legislature. The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

Id. at 10a-11a n.4 (citations omitted).[7]

REASONS FOR GRANTING THE PETITION

For a decade, the federal courts have entertained a series of lawsuits involving First Amendment challenges to the decisions of states concerning specialty license plates. Many have involved "Choose Life" plates, which currently are available in 19 states

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[6] In contrast, the district court had identified the "central purpose[s] of the specialty plate program" as being "to raise revenue" for the state and "to allow for some private expression." App., *infra*, 35a-36a, 43a, see also *id.* at 43a ("private expression is an important purpose for specialty plates")

[7] The Seventh Circuit also reasoned that a statutory amendment made while the case was on appeal (see note 2, *supra*) "moot[ed]" the facial challenge to the extent that it targeted the lack of "articulated standards governing * * * the *Secretary's* discretion to authorize new plates," but not with respect to the *legislature's* participation in the scheme. App., *infra*, 10a n.4 (emphasis added).

(and have been approved, but are not yet available, in five additional states).[5] Some cases have been initiated by entities and individuals whose request for a "Choose Life" plate was denied See, *e.g.*, *Arizona Life Coalition, Inc* v *Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008). (To date, Arizona, California, Illinois, Missouri, New York and New Jersey have each been sued in federal court based on such denials) Other cases have been brought by groups challenging a state's selective decision to *approve* a "Choose Life" plate (while not simultaneously approving a "pro-choice" plate). See, *e.g.*, *Planned Parenthood of S.C., Inc.* v. *Rose*, 361 F.3d 786, reh'g denied, 373 F 3d 580 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005); *ACLU of Tenn.* v. *Bredesen*, 441 F.3d 370 (6th Cir.), cert. denied, 548 U.S. 906 (2006). (To date, federal cases have challenged "Choose Life" plates approved by Florida, Louisiana, Ohio, Oklahoma, South Carolina, and Tennessee) Many of the lawsuits in both categories have – like this case – included as-applied as well as facial challenges.

The result of this extensive litigation is a patchwork of conflicting decisions, as courts have struggled to determine how expression on specialty license plates should be analyzed under the First Amendment (without the benefit of any guidance from this Court

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[5] See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map as well as approved plate designs) In addition, at least two states have "pro-choice" specialty plates Hawai'i ("Respect Choice") and Montana ("Pro-Family, Pro-Choice") *Ibid* Virginia's governor recently expressed a willingness to approve a "pro-choice" plate See Ertelt, *Virginia Governor Tim Kaine Signs Bill Creating Choose Life License Plates* (Mar. 30, 2009), http://www.lifenews.com/state4006.html. Petitioners have no objection to Illinois approving a "pro-choice" plate.

more recent than *Wooley* v. *Maynard*, 430 U.S. 705 (1977), a compelled-speech case involving an ordinary license plate and New Hampshire's state motto, "Live Free or Die"). In the decision below, the Seventh Circuit joined the Fourth, Eighth, and Ninth Circuits in holding that specialty plates contain private and not purely governmental speech; only the Sixth Circuit in *Bredesen* has taken a contrary view, which the Seventh Circuit expressly rejected. See App., *infra*, 2a & n.1; see also *Roach* v. *Stouffer*, 2009 WL 775581, *4-*8 & n.3 (8th Cir. March 26, 2009) (surveying cases, agreeing with majority view, and explaining that nothing in *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), changes the analysis); cf *Rose*, 361 F.3d at 794-95 ("Choose Life" plate that originated in legislature and was sponsored by state legislators was hybrid of government and private speech).[9]

Moreover, of the four circuits that have squarely held that specialty license plates contain private speech, two – the Fourth and Ninth – have upheld First Amendment challenges to a state's selective denial or approval of a "Choose Life" plate on the ground that the state's action constituted impermissible viewpoint discrimination. See *Stanton*, 515 F.3d at 968-72; *Rose*, 361 F.3d at 792-95; see also *Sons of Confederate Veterans, Inc.* v. *Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623-27, reh'g denied, 305 F.3d

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[9] The Second and Eleventh Circuits have also suggested, in an unpublished decision and in dicta, respectively, that specialty plates includes some private speech. See *Children First Found., Inc.* v. *Martinez*, 2006 WL 544502, at *1 (2d Cir. Mar. 6, 2006) ("custom license plates involve, at minimum, some private speech") (unpublished), on remand, 2008 WL 4367338 (N.D.N.Y Aug. 3, 2008); *Women's Emergency Network* v. *Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003).

241 (4th Cir. 2002) ("*SCV*"). Another of those circuits – the Eighth – recently held Missouri's specialty license plate scheme facially invalid without reaching the as-applied challenge. *Roach*, 2009 WL 775581, at *8-*11. The decision below conflicts with both of these lines of authority by (a) holding that Illinois's selective rejection of the "Choose Life" plate was *not* viewpoint discrimination, and (b) rejecting a facial challenge to Illinois's specialty plate scheme despite that scheme's delegation of standardless discretion to legislators to approve or deny new plates.

As result of these decisions, and in the absence of action by this Court, in the federal courts there are no Speech Clause restrictions on state officials' specialty license plate decisions in Michigan, Ohio, Kentucky, and Tennessee, since specialty plates are treated there as government speech. Selective decisions to deny or approve specialty plates violate the First Amendment in Alaska, Arizona, California, Guam, Hawai'i, Idaho, Maryland, Montana, Nevada, North Carolina, Northern Mariana Islands, Oregon, South Carolina, Virginia, Washington and West Virginia. And – because of the decision below – such selective decisions are constitutional in Illinois, Indiana, and Wisconsin. Moreover, specialty plate schemes that confer standardless licensing authority on legislative bodies (a common feature) violate the First Amendment in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, and in California, see *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), but are permissible in Illinois, Indiana, and Wisconsin. The Court should bring uniformity to this vitally important area of federal law and provide much-needed guidance on new types of

license plates that have been developed since *Wooley* was decided and are ubiquitous around the Nation.

I. This Court Should Resolve The Circuit Conflict Over Whether A State's Selective Denial Of A "Choose Life" Specialty License Plate Violates The First Amendment

The decision below creates or exacerbates several conflicts in the circuits over whether the First Amendment permits a state to deny selectively a "Choose Life" specialty license plate on the ground that its message is politically controversial. This is an important and recurring constitutional question, and the Seventh Circuit decided it incorrectly.

A. There Are Multiple Circuit Conflicts

1. The Seventh Circuit placed itself in conflict with several circuits that have upheld as-applied First Amendment claims indistinguishable from the one in this case. Indeed, the Seventh Circuit acknowledged that "the Ninth Circuit came to the opposite conclusion" in *Stanton*, a case "very much like" this one. App., *infra*, 19a, 25a.

In *Stanton*, the Ninth Circuit reversed a grant of summary judgment for the Arizona License Plate Commission, concluding that the Commission had impermissibly denied an application for a "Choose Life" specialty plate based on the nature of the message expressed on the plate. 515 F.3d at 972. The state argued that it had denied the plate "not because of the viewpoint it expressed but because the state did not wish to entertain specialty plates on *any* aspect of the abortion debate." App., *infra*, 25a; 515 F.3d at 972. The Ninth Circuit rejected that argument and also concluded that "[p]reventing Life Coalition from

expressing its viewpoint out of a fear that other groups would express opposing views seems to be a *clear form* of viewpoint discrimination." 515 F.3d at 972 (emphasis added); App., *infra*, 25a-26a.

2. The sharp disagreement between the Seventh and Ninth Circuits over whether the selective denial of a "Choose Life" plate violates the First Amendment was based, in part, on conflicting interpretations of *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The Ninth Circuit read *Rosenberger* to have "rejected" an argument that was "similar" to Arizona's claim that it had engaged only in content-based, but not in viewpoint, discrimination. 515 F.3d at 971.

In *Rosenberger*, the majority held that a public university violated the First Amendment when it withheld funding to a student publication because the magazine "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. In rejecting the dissent's argument that there was no viewpoint discrimination because the university had limited *all* religious speech, both theistic and atheistic, the majority explained:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar * * *. *If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one.* It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint

Id. at 831 (emphasis added). The Ninth Circuit directly relied on that passage in rejecting Arizona's argument that its licensing scheme did not constitute viewpoint discrimination *Stanton*, 515 F.3d at 971.

The Seventh Circuit expressly disagreed with the Ninth Circuit's reading of *Rosenberger*. App., *infra*, 26a-27a. The Seventh Circuit held that the passage quoted above "actually undermines the Ninth Circuit's conclusion." *Id.* at 27a. "Excluding a faith-based publication from a speech forum because it is *faith based*," the Seventh Circuit reasoned, "is indeed viewpoint discrimination; where all other perspectives on the issues of the day are permitted, singling out *the religious perspective* for exclusion is discrimination based on viewpoint, not content." *Ibid.* (emphasis added). "In contrast, here (and in *Stanton*, too)," the Seventh Circuit reasoned, "the State has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion." *Ibid.* In this situation, the Seventh Circuit reasoned, the state "has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral." *Ibid.*

The Seventh Circuit's analysis not only ignores the example of racism given in *Rosenberger* but also misapprehends the university's policy, which excluded both theistic *and atheistic* viewpoints and thus was hardly limited to speech that was "faith based" or reflective of a "religious perspective." In any event, this Court's review is necessary to resolve the disagreement over the meaning of *Rosenberger* and its implications for the dividing line between viewpoint and content-based discrimination.

3 Like the Ninth Circuit, the Fourth Circuit has held that a state's selective rejection (or approval) of a specialty license plate violates the First Amendment. See *SCV*, 288 F 3d at 623-27; *Rose*, 361 F.3d at 794-95. In *SCV*, Virginia had authorized a "Sons of Confederate Veterans" license plate but barred that plate from including a logo or emblem (the Confederate flag) In *Rose*, the South Carolina legislature had authorized a "Choose Life" plate (without, at the same time authorizing a "pro-choice" plate). The Seventh Circuit acknowledged that both *SCV* and *Rose* involved "fairly obvious instances of discrimination on account of viewpoint" (App., *infra*, 25a), but thought they were distinguishable·

> Virginia was not imposing a "no flags" rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint. South Carolina was favoring one viewpoint on the subject of abortion over any other.
>
> Here, in contrast, Illinois has excluded the entire subject of abortion from its specialty-plate program.

App., *infra*, 25a. But in *SCV* Virginia made an argument very similar to Illinois's in this case – that the logo proscription was viewpoint neutral because it reflects a ban on "*all* viewpoints about the Confederate flag (which the [state] identifies as a category of 'content' or subject matter) from the special plate forum." 288 F.3d at 623 (emphasis added) (Presumably, then, Virginia also would have barred the use of the Confederate flag with a circle around it and a line through it on a "No Racism" plate.) Unlike the panel

in this case, however, the Fourth Circuit rejected that assertion.[10]

4. The Fourth and Ninth Circuit's *analytical approach* to determining whether a state has engaged in viewpoint discrimination is also markedly different from the Seventh Circuit's approach in this case. The Fourth and Ninth Circuits both began by expressing concern that the state's action was motivated by the nature of the message as politically controversial, noting that such bans on controversial speech too easily lend themselves to impermissible viewpoint discrimination. See *Stanton*, 515 F 3d at 972; *SCV*, 288 F.3d at 624 (pointing to "inherent danger of viewpoint discrimination"); see also *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) ("[T]he purported concern to avoid controversy * * * may conceal a bias against the viewpoint advanced by the excluded speakers").

Both appellate courts also looked beyond the justifications offered by the state for rejecting or selectively regulating the specialty plates. Both carefully examined the actual limits on expression in the specialty plate program as reflected in the governing statutes and regulations and the record evidence of the state's practices concerning approval of specialty plates. See *Stanton*, 515 F.3d at 972; *SCV*, 288 F.3d at 624-26. Using a similar approach, the district court in this case concluded that Illinois had engaged in viewpoint discrimination. See App., *infra*, 35a-36a, 40a, 44a, 49a-50a (state's "reason for denying the speech" is

[10] The Seventh Circuit's decision also conflicts with other decisions See, *e.g.*, *Sons of Confederate Veterans, Inc* v. *Glendening*, 954 F. Supp. 1099, 1103 (D. Md. 1997); *Pruitt* v *Wilder*, 840 F. Supp. 414 (E.D. Va. 1994) (vanity plate case involving rejection of "GODZGUD" plate).

that the plate's message "is controversial"; there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for" denying the plate; and record showed that approximately 60 plates "bear[ing] a medley of various special-interest messages" had been approved whereas state has presented "no evidence that the General Assembly" had ever "exercised its discretion in denying a specialty plate").

The Seventh Circuit's approach could hardly be more different. The panel expressed no concern that the state's justification for rejecting the "Choose Life" plate hinged on the politically controversial nature of the plate's message. It accepted uncritically the state's new assertion on appeal that denial of the "Choose Life" plate reflected an undocumented policy in the General Assembly of excluding "the entire subject of abortion" from the specialty plate program. But see App., *infra*, 30a (Manion, J., concurring) (expressing "reservations" about lead opinion's statement that "it is undisputed" that Illinois has excluded "the entire subject of abortion"; noting that "[t]his is nothing more than the Illinois legislature rejecting efforts to approve a single specialty license plate, 'Choose Life.'"). The panel also ignored the fact that the state's new assertions on appeal (1) contradicted the state's admission in the trial court that it was *aware of no standards employed by the General Assembly* (see note 5, *supra*); and (2) were inconsistent with the record evidence, which showed that the General Assembly had used a special ad hoc hearing procedure that would have been unnecessary if there had actually been a policy of excluding the "entire subject of abortion" from specialty plates. App., *infra*, 64a-67a. As if that were not enough, the panel also ignored respondent's history

in this litigation of offering conflicting justifications for the General Assembly's rejection of the plate [11] Finally, the Seventh Circuit also failed to consider the evidence concerning the state's statutes, regulations, and permissive historical practice of approving plates – all of which severely undercut the supposed "exclusion" claimed by the state. See page 16 and notes 4-5, *supra*.

5. The Seventh Circuit's conclusion that specialty plates are a nonpublic forum and its determination that the exclusion of the "Choose Life" plate was reasonable also conflict with the decisions of other courts. Although most courts entertaining specialty-plate cases have (like the district court here) avoided deciding the nature of the forum because they have found viewpoint discrimination (or resolved the case on other grounds), several courts and commentators have concluded that specialty plates should be treated as a designated

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[11] The state's explanations have shifted repeatedly. As previously noted, in the trial court respondent first took the position that the plate was rejected because the state disagreed with its message See page 5, *supra*. After petitioners pointed out that this was tantamount to a confession of viewpoint discrimination, respondent shifted gears and argued that in fact "he had *no knowledge* concerning why the legislature approved, or did not approve, specific specialty plates " Defs.' Motion To Alter or Amend The Judgment, at 7 (Feb 6, 2007) (emphasis added); see also note 5, *supra*. In the appellate court, respondent found the missing knowledge and argued that the "Choose Life" plate was rejected because it involved the "politically sensitive" topic of "abortion" and the General Assembly had in fact excluded the entire "subject of abortion." Resp. C.A. Op. Br. 31. In his reply brief and at oral argument, respondent's shape-shifting continued he suggested that the zone of exclusion might not be "abortion" but instead "reproductive rights" (which, as Judge Manion correctly observed, is much broader) Compare Resp C.A. Reply Br 2 (the "topic" and "issue" of abortion) with *id.* at 3 ("the topic of reproductive rights"). See also Oral Arg. Audiotape, at 1 03-22, 14 56-15:37, *available at* http://www.ca7 uscourts gov.

public forum. The *SCV* district court, for example, reached that conclusion based on a careful examination of the relevant factors set out in *Cornelius* 473 U.S. at 802, including the government's policy and practice, the nature of the property, and the compatibility of the place with the expressive activity at issue. See *Sons of Confederate Veterans* v. *Holcomb*, 129 F. Supp. 2d 941, 947-49 (W.D. Va. 2001), aff'd on other grounds, 288 F.3d 610 (4th Cir. 2002). Thus, the *SCV* district court emphasized that Virginia's policy and practice had been to approve a "wide range of specialty plates" and there was a close nexus between "the expression sought and the forum created." 129 F. Supp. 2d at 948. Because creation of the specialty plate program represented Virginia's "intentional action to open up a non-traditional forum for public discourse," that program was "precisely the type of designated public forum contemplated by the Court in *Cornelius*." *Ibid.*[12]

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[12] See also Berry, *Licensing A Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1624-30 (2002) (specialty plates should be treated as designated public forum, "the 'Choose Life' plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate"), Guggenheim & Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577-79 (2000) (specialty plates should be considered designated or limited public forum but vanity plates should be considered nonpublic forum). The Eighth Circuit has expressed "skepticism about characterizing a license plate as a nonpublic forum," explaining that "a [vanity] plate is not so very different from a bumper sticker that expresses a social or political message" and "[t]he evident purpose of such a 'forum[]' * * * is to give vent to the personality, and to reveal the character or views, of the plate's holder." *Lewis* v. *Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (dicta), cert. denied, 535 U.S. 986 (2002).

Similarly, the Ninth Circuit held in *Stanton* that Arizona had "open[ed] up its license plate forum" "to a certain class of organizations," thereby creating a "limited public forum," and had acted unreasonably in rejecting the "Choose Life" plate. 515 F.3d at 969-73. In concluding that Arizona's specialty plate program was "limited," the Ninth Circuit relied on certain access restrictions in the Arizona scheme that had been consistently applied and that have no analogue in Illinois. *Id.* at 970. Faced with a scheme such as Illinois's, the Ninth Circuit likely would have held the specialty plate program to be an ordinary "designated public forum." What is more, the Ninth Circuit in *Stanton* ruled that it was *unreasonable* for Arizona to deny the "Choose Life" plate because the state's reasons (identical to Illinois's reasons in this case) were "not statutorily based or related to the purpose of the limited public forum." *Id.* at 972-73. So, too, here. Yet the Seventh Circuit came to the opposite conclusion, concluding that Illinois's rejection of the "Choose Life" plate was reasonable. App., *infra*, 24a, 27a-28a.

6. Finally, if review is granted, respondents presumably will renew their principal argument in the lower courts: that specialty license plates represent *government* rather than private speech. Although the Seventh Circuit has joined the Fourth, Eighth, and Ninth Circuits in squarely rejecting that argument, the Sixth Circuit has taken a contrary view. See App., *infra*, at 11a-22a, 40a-48a; see also *Roach*, 2009 WL 775581, *3-*7; *Rose*, 373 F.3d at 582-89 (Shedd, J., joined by Williams, J., dissenting from denial of rehearing en banc) (arguing that specialty plates are government speech). Thus, further review is likely to provide an occasion for this Court to resolve this entrenched and important circuit conflict as well.

B. The Issues Raised By Petitioners' As-Applied Challenge Are Recurring And Important

As the many cases cited above demonstrate, the constitutionality of a state's selective treatment of a "Choose Life" specialty license plate is a recurring issue.[13] "Choose Life" plates have been approved in 24 states, and efforts are underway to gain approval in at least 14 more states. See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map). Hawai'i and Montana have "pro-choice" plates, and there have been efforts to gain approval of "pro-choice" plates in at least six other states. *Ibid.*; see Daffer, *A License To Choose Or A Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 891-92 (2007). All of this activity and litigation has occurred since 1999, when Florida became the first state to approve a "Choose Life" plate. Daffer, 75 UMKC L. REV. at 871-72.

Moreover, similar issues have arisen in cases involving other potentially controversial specialty license plates. See, *e.g.*, *SCV*, 288 F.3d at 613-29; *Glendening*, 954 F. Supp. at 1103; *Summers* v. *Adams*, 2008 WL 5401537 (D.S.C. Dec. 23, 2008) (First

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[13] Other cases not cited above involving "Choose Life" plates include *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), on remand, 2008 WL 822070 (N.D. Okla. 2008); *Children First Found., Inc.* v. *Legreide*, 2005 WL 3088334 (D.N.J. Nov. 17, 2005), vacated, 259 Fed. App'x 444 (3d Cir. 2007); *NARAL Pro-Choice Ohio* v. *Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), appeal dismissed, Order (6th Cir. Sept. 14, 2006) (No. 05-4338); *Henderson* v. *Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000), rev'd and remanded, 287 F.3d 374 (5th Cir. 2002), on remand, 265 F. Supp. 2d 699, stay denied, 281 F. Supp. 2d 866 (E.D. La. 2003), vacated, 407 F.3d 351 (5th Cir. 2005); and *Hildreth* v. *Dickinson*, 1999 WL 36603028 (M.D. Fla. Dec. 22, 1999).

Amendment challenge to "I Believe" specialty license plate). Specialty plate programs exist in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. See Teigan & Farber, *Nat'l Conference of State Legislatures, Transportation Review: Motor Vehicle Registration and License Plates*, at 22-25 (2007) *available at* http://www.ncsl.org/print/transportation/license-registration07.pdf; see also *Motor Vehicle Registration and License Plates: NCSL Transportation Review* App. B (2009), http://www.ncsl.org/programs/transportation/AppendB_licenseplate09.htm (listing jurisdictions and updated number of approved specialty plates). By last count, more than 4,325 specialty plates were available nationwide (*ibid.*), and that number continues to grow. Most if not all states also offer vanity or personalized plates, which regularly give rise to similar First Amendment challenges. Teigan & Farber, *supra*, at 8 (describing ACLU litigation against South Dakota for seeking to recall "MPEACHW" plate); see also notes 10, 12, *supra*.

Finally, the Seventh Circuit's decision exacerbates conflicts and confusion in the lower courts over three embedded doctrinal issues that have significance far beyond the extensive litigation over "Choose Life" plates: (1) the proper line between viewpoint and content-based discrimination; (2) the proper forum analysis of specialty license plates; and (3) the proper line between government and private speech. These issues are of surpassing importance to the public and to government officials across the Nation. See *SCV*, 305 F.3d 241, 247-48 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc by 6-5 vote) (arguing that case involves an "important First Amendment issue" on which the circuits have "taken different analytical courses"); *id* at 253 (Gregory, J.,

dissenting from denial of rehearing en banc) (the "issues presented here are important").

C. The Decision Below Is Wrong

The Seventh Circuit was wrong in rejecting petitioners' as-applied First Amendment challenge. The panel also erred in each step of its analysis (except, of course, for its threshold determination that specialty license plates are not government speech).

1. Illinois's rejection of the "Choose Life" plate is viewpoint discrimination. As *Rosenberger* makes clear, the exclusion of several different viewpoints on the issue of abortion – no less than on the issue of racism – constitutes viewpoint and not merely content-based discrimination. The Seventh Circuit's efforts to distinguish *Rosenberger* were unavailing. See page 14, *supra*. Moreover, as explained above, the panel erred both in (a) accepting uncritically the state's assertion that it was following an unwritten policy of excluding the "entire subject of abortion" from the specialty plate program; and (b) failing to consider the substantial record evidence contradicting or undercutting the state's assertion. See pages 17-18 & notes 4-5, 11, *supra*.

2. Specialty license plates are properly treated as a designated public forum, as other courts (and several commentators) have concluded. See pages 17-19 & n.9, *supra*. Illinois, like most other states, has intentionally opened up its license plates – which are borne by privately owned vehicles and historically served only to facilitate vehicle identification – to create a forum for public discourse and private expresssion. As the Seventh Circuit acknowledged, specialty plates "serve as 'mobile billboards' for the organizations and like-minded vehicle owners to promote their causes."

App., *infra*, 21a; accord *Wooley*, 430 U.S. at 715 (comparing license plate to a "mobile billboard" and noting that driver communicates its message "as part of his daily life" and "indeed constantly while his automobile is in public view"). Thus, the "policy and practice of the government" in freely approving scores of specialty plate designs (see note 4, *supra*), "the nature of the property" (a mobile billboard selected by the vehicle owner), and specialty plates' "compatibility with expressive activity" all confirm that specialty plates are a designated public forum. App., *infra*, 23a; see also pages 5-7, *supra*.

The Seventh Circuit was able to reach a contrary decision only by redefining the relevant forum as *license plates generally* rather than specialty plates. App., *infra*, 24a. The Seventh Circuit erred by shifting its focus away from specialty plates. This also created internal inconsistencies in the court's opinion, since the Seventh Circuit's analysis of the government speech issue had instead focused on specialty plates. As the district court correctly recognized, the primary purpose of specialty plates includes permitting vehicle owners to engage in expression. See note 6, *supra*. Because specialty plates are designated public fora, content-based restrictions on them are subject to strict scrutiny. Tellingly, Illinois has never suggested that its rejection of the "Choose Life" plate could survive strict scrutiny.

Finally, even if specialty plates are a nonpublic forum, the Seventh Circuit erred in concluding that Illinois's rejection of the "Choose Life" plate was reasonable. Reasonableness must be evaluated not in the abstract but "*in the light of the purpose of the forum* and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809 (emphasis added). Because the purposes of

specialty plates are to raise revenue for the state and sponsoring organizations and to permit private expression, the crucial question is whether excluding "the entire subject of abortion" serves those purposes. Plainly, it does not. The Seventh Circuit was therefore mistaken in concluding that, "[t]o the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion." App., *infra*, 28a.[14] Indeed, the premise underlying that rationale – that specialty plates are "reasonably viewed as having the State's stamp of approval" (*id.* at 27a) – is highly dubious, as the Eighth Circuit recently noted.[15] It is especially dubious here, because Illinois has repeatedly refused to issue the "Choose Life" plate and has vigorously defended this litigation – a fact that would be apparent to any "fully informed observer."

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[14] There is further reason to be skeptical of respondent's claim that Illinois wishes to avoid abortion-related or reproductive-rights-related specialty plates because they involve subjects that are too politically divisive or controversial. Two months after rehearing was denied in this case, respondent announced the availability of "special event" license plates bearing the words, "Illinois Salutes President Barack Obama." Press Release, at 1 (Feb. 13, 2009), *available at* http://www.cyberdriveillinois.com/press/2009/february/090213d1.html.

[15] *See Roach*, 2009 WL 775581, at *7-*8 (concluding that "a reasonable and fully informed observer" would "understand that the vehicle owner took the initiative to purchase the specialty plate and is voluntarily communicating his or her own message, not the message of the state"); *id.* at *7 (noting with respect to the 'ARYAN-1' plate at issue in *Lewis* that "[n]o reasonable observer would believe that the State of Missouri is endorsing white supremacy").

II. This Court Should Resolve The Conflict Over Whether A Standardless Licensing Scheme Survives A Facial Challenge If It Delegates Licensing Authority To A Legislative Body

Petitioners' facial challenge targeted the complete absence in the Illinois Vehicle Code and in the Secretary's administrative policy (as stated in his "Fact Sheet") of *any* substantive criteria or guidelines that would govern the state's decision to approve or reject new specialty plates. App., *infra*, 10a-11a n.4, 37a n.2. This standardless discretion over the licensing of private expression, petitioners maintained, violated the First Amendment under a long line of this Court's decisions. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 393-94 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988) (condemning as a prior restraint); *Nietmotko* v. *Maryland*, 340 U.S. 268, 273 (1951), *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).[16]

The district court had no occasion to reach the facial challenge, but it did observe (based on the undisputed facts) that there were "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly" and that respondent "has not explained why delegating his authority to approve requests [to the General Assembly] protects him from constitutional review of his actions." App., *infra*, 37a n.2; note 5, *supra*. By the time the case reached the Seventh Circuit, the state had come up with an explanation, contending that,

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[16] While this case was pending on appeal, Illinois amended its Vehicle Code. See note 2, *supra*. But the amendment did nothing to provide any substantive standards or guidelines to channel the General Assembly's unfettered discretion to permit or stifle the messages on specialty license plates.

"[a]s the ultimate repository of legislative power in Illinois," the General Assembly "cannot be ordered to impose on itself prospectively binding standards" because any such "prescriptive standards" "cannot limit the exercise of that power by future sessions of the General Assembly." Resp. C.A. Op. Br. 42, 43.[17]

Crediting this new-found argument, the Seventh Circuit summarily rejected petitioners' facial challenge. App., *infra*, 10a n.4. It reasoned that the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid because:

> It is axiomatic that one legislature cannot bind a future legislature. *Vill. of Rosemont* v *Jaffe*, 482 F 3d 926, 937-38 (7th Cir. 2007) (citing *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932)). The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

App., *infra*, 10a-11a n.4. This aspect of the Seventh Circuit's decision independently warrants review.

A. The Seventh Circuit's Holding Conflicts With Decisions Of This Court, The Eighth Circuit, And Other Lower Courts

The Seventh Circuit's rejection of the facial challenge is inconsistent with a subsequent decision of the Eighth Circuit, *Roach* v. *Stouffer*, 2009 WL 775581

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[17] Contrary to the state's suggestion, petitioners never requested that the lower court "order" the General Assembly to adopt standards. They simply sought to enjoin the operation of the standardless program already in existence. Pet. C.A. Br. 43-44.

(8th Cir. Mar. 26, 2009), which invalidated on its face a Missouri specialty license plate scheme that delegated approval authority to a joint legislative Committee on Transportation Oversight (consisting of seven state senators, seven state representatives, and three non-voting *ex officio* members). After the Committee denied an application for a "Choose Life" plate, the rejected applicant – Choose Life Missouri – and its president brought suit. Both the district court and the Eighth Circuit held that the licensing scheme was facially invalid because it "provide[d] no standards or guidelines whatsoever to limit the unbridled discretion of the Joint Committee." 2009 WL 775581, at *8. The Eighth Circuit rejected the state's argument that the result should be different because "the only voting members of the Joint Committee are *legislators*, not administrators or hired state employees," explaining that any immunity from suit for legislators would apply only to suits against officials sued in their individual capacities (not, as here, in their official capacities). *Id.* at *9; see also *Lewis*, 253 F.3d at 1078-83 (Eighth Circuit held that Missouri vanity plate scheme with vague approval standards is facially invalid).

The Seventh Circuit's creation of a novel "legislative body" exception to the long line of authority condemning standardless licensing schemes is equally incompatible with this Court's decisions. In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), this Court invalidated the conviction of civil rights protesters for violating an ordinance that required a permit from the City Commission to participate in a parade or public demonstration. The Commission was "the City's legislative body." *Shuttlesworth* v. *City of Birmingham*, 180 So. 2d 114,

126-27 (Ala. Ct. App. 1965); accord *Henderson* v. *Stalder*, 287 F.3d 374, 389 n.9 (5th Cir. 2002) (Davis, J., dissenting). Even though the permitting authority was a legislative body, this Court had no difficulty concluding that the city ordinance "conferr[ing] upon the City Commission virtually unbridled and absolute power" to prohibit parades or demonstrations "*fell squarely within the ambit* of the *many* decisions of this Court over the last 30 years, holding that [a standardless licensing scheme] is unconstitutional." 394 U.S. at 150-51 (emphasis added); see also *Niemotko*, 340 U.S. at 273-74 (reaching same conclusion in case where permit applications were customarily made to Park Commissioner and, if he denied them, to City Council).

Finally, other lower federal and state courts have likewise rejected the "legislator" or "legislative body" exception embraced below. In *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), for example, the district court held that California's specialty plate scheme was facially unconstitutional because the state legislature had been given unbridled discretion to issue new plates. The court explained that "[l]eaving that authority directly in the hands of the legislature does not change the analysis." *Id.* at 1153 (internal quotation marks omitted). Similarly, the district court in *Rose* held that South Carolina's specialty license scheme was facially invalid because it granted "uncontrolled discretion" to "the legislature" to decide which plates to approve. *Planned Parenthood of S.C., Inc.* v. *Rose*, 236 F. Supp. 2d 564, 573 (D.S.C. 2002), aff'd on other grounds, 361 F.3d 786 (4th Cir. 2004); see also *Henderson* v. *Stalder*, 265 F. Supp. 2d 699, 719 (E.D. La. 2003) (Louisiana prestige plate licensing scheme facially

unconstitutional where legislature was decisionmaker, and there were "no standards, parameters, guidelines or other criteria by which a prestige plate c[ould] be issued"), rev'd on other grounds, 407 F.3d 351 (5th Cir 2005), *Stalder*, 287 F 3d at 388-89 (Davis, J., dissenting) ("Leaving that [standardless] authority directly in the hands of the Louisiana legislature should not change the analysis"); *Shuttlesworth*, 180 So. 2d at 127 ("'[T]he rule is no different where the legislative body reserves for itself the administration of the licensing power.'") (quoting *ACLU v. Town of Cortlandt*, 109 N.Y.S.2d 165 (N.Y Sup 1951))

B. The Issues Raised By Petitioners' Facial Challenge Are Recurring And Important

As the cases cited in the previous section show, the facial validity of standardless specialty license plate schemes is an issue that arises with considerable frequency. Indeed, many of the cases involving "Choose Life" license plates have raised both as-applied and facial challenges. The reported decisions understate the frequency with which the issue arises, because many cases have been resolved on alternative grounds. Because 24 states have approved the "Choose Life" plates and approval is being sought in another 14 jurisdictions, litigation over this question can be expected to continue – and be fueled by the Eighth Circuit's recent decision in *Roach*. And, of course, the issue can be expected to arise in litigation involving other types of specialty plates as well.

As noted above, all states have specialty license plate schemes. Many of these schemes grant standardless licensing authority to the legislature or to other government officials. See Daffer, *supra*, 75 UMKC L. REV. at 893 (28 states now require legislative

approval before specialty plates can be used, whereas 19 states have a purely administrative process; some states have both methods of approval). Similarly, state schemes authorizing *personal or vanity* plates often contain vague or indeterminate standards governing approval decisions. See, *e.g.*, *Lewis*, 253 F 3d at 1078-83 The issue thus has implications for a broad range of state programs. And the facial validity under the First Amendment of these licensing schemes is clearly an important question. Finally, if permitted to stand, the Seventh Circuit's rationale for upholding an admittedly standardless licensing scheme for private expression – *i.e.*, one legislature cannot bind a future legislature – could invite imitation in a wide range of other settings where standardless schemes chill expression.

C. The Seventh Circuit's Decision Is Wrong

The Seventh Circuit's terse departure from the foregoing precedents was evidently based on its view that, to implement licensing standards sufficient to survive a facial challenge, a legislative body must bind itself *permanently* to a particular set of substantive criteria for approving specialty plates. Such a requirement, the Seventh Circuit reasoned, might violate the so-called rule against legislative entrenchment, under which "the will of a particular Congress * * * does not impose itself upon those to follow in succeeding years." *Reichelderfer*, 287 U.S. at 317-18 (involving validity of statute purporting to "perpetually dedicate[]" Rock Creek Park to certain uses); see also *United States* v. *Winstar Corp.*, 518 U.S 839, 872 (1996); Posner & Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L J. 1665 (2002) (arguing that the principle is invalid and should be abandoned). But the Seventh Circuit's reasoning is flawed for at least three reasons.

First, to create a constitutional licensing system complete with substantive standards to guide decisionmaking, a legislature need not entrench criteria against future repeal (such as by requiring that changes be made only by a supermajority of a future legislature). Instead, it need only enact neutral, non-entrenched standards and apply them in good faith until (if ever) it formally adopts different ones for reasons unrelated to a specific application. At bottom, the Seventh Circuit relied on a faulty syllogism, which posits that: (1) standards are meaningless *unless* they are entrenched; (2) legislative entrenchment is impermissible; thus (3) standards that meaningfully curb legislative discretion are impermissible and cannot be required. That reasoning gets off on the wrong foot

Second, the rule against legislative entrenchment applies only to the "legislative authority" of future legislatures. *Winstar*, 518 U.S. at 872. It is far from clear that the discretionary authority to decide who may speak in the specialty plate forum, authority delegated to the "General Assembly" by Illinois statute, implicates the General Assembly's lawmaking powers. The same licensing authority, if conferred on the Secretary of State, clearly would *not* involve "legislative" authority. Why should the decision to delegate that authority to a legislative body alter that conclusion? See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983) ("[T]he nature of a proceeding depends not upon the character of the body but upon the character of the proceedings.") (internal quotation marks omitted).

Third, even entertaining the dubious assumption that federal law enshrines the rule against entrenchment as a protection of the prerogatives of

state legislatures, the rule could hardly trump the First Amendment (or the power of the federal courts to remedy a constitutional violation). See *Winstar*, 518 U.S. at 872-73 (unlike Parliament, where rule originated, "the power of American legislative bodies * * * is subject to the overriding dictates of the Constitution" with which the rule "has always lived in some tension"). The exact same threat to freedom of expression posed by standardless licensing schemes – and condemned by the First Amendment – exists when unfettered licensing authority is delegated to a legislative body.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

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